STATE OF MICHIGAN

COURT OF APPEALS

JEFFERY LANE,

Plaintiff-Appellant,

v

RUDOLPH DINNOCENZO, DARLENE DINNOCENZO, and JACQUELINE JACKSON,

Defendants-Appellees,

and

PAUL G. FREUDENBURG, d/b/a SHERLOCK OF HOMES,

Defendant.

UNPUBLISHED
August 17, 2006

No. 268370
Berrien Circuit Court
LC No. 05-002817-CZ

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) to defendants Rudolph "Rudy" Dinnocenzo, Darlene Dinnocenzo, and Jacqueline Jackson. We affirm.

I Basic Facts And Procedure

In May 2003, defendants inherited their mother's cottage in Lakeside, Michigan. Plaintiff's parents, for the past 25 years, owned the cottage next door to defendants' mother. In the summer of 2003, defendants sold their cottage to plaintiff. A month before plaintiff closed on the cottage, defendants submitted a seller's disclosure statement to plaintiff. In the disclosure statement, defendants represented that the fireplace and chimney were in working order and that they were unaware of any structural damage to the cottage. Defendants also signed their initials on the line next to the question asking if there were a history of infestation. When plaintiff began making repairs to the cottage, he made the alleged following discoveries: (1) carpeting in the living room, the dining room, and in the hallway next to the bathroom concealed floors that were rotting from water damage; (2) paneling covered water damage to the fireplace; and (3) carpenter ants. Plaintiff thereafter gutted the cottage to its studs and rebuilt it.

Plaintiff sued, claming that defendants made fraudulent misrepresentations concerning the condition of the cottage. Defendants moved for summary disposition under MCR 2.116(C)(10). This appeal followed.

II Analysis

On appeal, plaintiff claims that his deposition testimony created a genuine issue of material fact regarding whether defendants knew of the rotting floors, the water damage to the fireplace, and the carpenter ants. We disagree.

1. Standard Of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

2. Liability Under The Seller Disclosure Act

Plaintiff's claim implicates the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*, which imposes a duty upon a seller of certain real property to disclose its known defects to a buyer. *Bergen v Baker*, 264 Mich App 376, 383-385; 691 NW2d 770 (2004). Under the SDA, a seller of real property must provide the buyer or his agent with a seller disclosure form. MCL 565.954. In the disclosure form, the seller must disclose certain information concerning the condition of the property. MCL 565.957. However, a seller is not liable for any error, inaccuracy, or omission in the disclosure form if the error, inaccuracy, or omission was not within the seller's personal knowledge. MCL 565.957. A seller is liable for common law fraud or silent fraud if a seller makes misrepresentations in the disclosure form. *Id.* at 382.

To establish a claim for common law fraud, a plaintiff must prove the following five elements:

> (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Id.* [Citations omitted.]

To establish a claim for silent fraud, a plaintiff must prove that the defendant suppressed a material fact that he had a legal or equitable duty to disclose. *M&D, Inc v WB McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). In addition, "there must be some type of misrepresentation, either by words or by action." *Id.* at 36.

At his deposition, plaintiff admitted that the carpeting and paneling that allegedly hid evidence of rot were installed before defendants inherited the cottage. Nevertheless, plaintiff

asserted that defendant Rudolph Dinnocenzo (Rudy) made all the repairs to the cottage in the 30 years that defendants' mother owned it, and Rudy therefore must have installed the carpeting and paneling. Thus, under plaintiff's theory, defendants must have known about the water damage to the floors and the fireplace.

Plaintiff presented no evidence to support his contention that Rudy made all repairs to the cottage. There was no evidence regarding how often plaintiff visited his parents' cottage, how often he saw Rudy make repairs to the cottage, or what repairs he saw Rudy make. Therefore, it was speculative to argue that Rudy covered the evidence of rot, and because the conclusory statement on which the argument was based was devoid of detail, the trial court properly granted summary disposition to defendants on plaintiff's claim that they misrepresented known structural damage to the cottage and the condition of the fireplace in the seller's disclosure form. *Quinto, supra* at 371-372. Because plaintiff provides no evidence that defendants knew of the alleged damage, he cannot survive summary disposition.

Plaintiff also argues that the trial court made an impermissible finding of fact that the ants observed by plaintiff while remodeling were not carpenter ants. A trial court may not make findings of fact when deciding a motion for summary disposition. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). The trial court, though, did not make a factual finding that the ants plaintiff saw were not carpenter ants. Rather, plaintiff failed to present any evidence that would permit a fact-finder to reasonably infer, without speculating, that the ants plaintiff saw were in fact carpenter ants. At his deposition, plaintiff testified that he could not distinguish carpenter ants from black ants. Furthermore, plaintiff's assertion flies in the face of available evidence: A pest inspector found no signs that the cottage was or had been infested with carpenter ants. Finally, the mere presence of ant traps in the cottage does not allow one to conclude that the cottage was infested with carpenter ants. Ant traps can be used to kill all types of ants and they can be used as a precaution to prevent an ant infestation. Thus, plaintiff's claim is conjecture. *Buckeye Union Fire Ins Co v Detroit Edison Co*, 38 Mich App 325, 331-332; 196 NW2d 316 (1972).

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S Owens